Filed 8/24/04 Marriage of Lukasik CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of KARA and JAMES LUKASIK.	
KARA LUKASIK, Appellant, v. JAMES LUKASIK, Respondent.	D042235 (Super. Ct. No. DN94553)

APPEAL from an order of the Superior Court of San Diego County, Jeffrey Barton, Judge. Affirmed.

In this marital dissolution proceeding, Kara Lukasik (Kara) sought an order authorizing her to move with her daughter (Erika) from San Diego County to Florida (the move away order). Kara had primary physical custody of Erika. Erika's father and Kara's former husband (James) opposed the requested move away order and sought an order shifting primary physical custody of Erika to him. The court ordered that Erika

remain in Southern California, her primary residence remain with Kara as long as Kara resided in Southern California, but primary physical custody of Erika would shift to James if Kara moved to Florida.

On appeal, Kara argues the court employed the wrong standard for evaluating her requested move away order, and the trial court's order was therefore an abuse of discretion.

I

FACTUAL AND PROCEDURAL BACKGROUND

Kara and James married in 1986. Kara filed for dissolution of the marriage in June 1996. They had one child, Erika, who was 19 months old at the time the dissolution petition was filed.

The parties' marital settlement agreement was incorporated into the court's September 1997 judgment of dissolution. It stipulated that the parties would share joint legal custody of Erika, whose primary residence would be with Kara. The parties also agreed James would have frequent visitation with Erika[1] and enjoy limited vacation privileges with her. The marital settlement agreement recited that "it is in the best interests of [Erika] to continue to have frequent and continuing contact with both of [her] parents," and neither party would change Erika's residence from San Diego County without giving the other party 60 days written notice of any planned change of residence.

---

1 James was given care of Erika on weeknights from the time he left work until Kara picked her up after Kara left work (with James having more extended hours with Erika on Wednesday nights), and the parties divided weekend time with Erika.

In June 2002 Kara filed an Order to Show Cause (OSC) seeking the move away order. She asserted her local job was unstable and required extensive travel, and she had better long-term prospects, both financially and in her ability to provide care for Erika, were she permitted to move to Florida to attend school to become a teacher. She planned to use the proceeds from the sale of her California residence to finance her return to school, and was moving near her mother and brother, who could provide child care for Erika when Kara was unavailable.

James opposed Kara's requested move away order and sought an order shifting primary physical custody of Erika to James or, alternatively, appointing an Evidence Code section 730 evaluator to determine what custody and visitation arrangements were in Erika's best interests. The court continued the hearing on Kara's OSC and appointed Dr. Kachorek to evaluate the custody issues.

Dr. Kachorek's extensive written report, describing his evaluation and recommendations, was received into evidence at the hearing on Kara's OSC. He reported that, although neither Kara nor James were perfect, both were likely to succeed in a single parenting role, and Erika had a strong, loving, bonded relationship with both parents. Kachorek noted that Ms. H., James's live-in girlfriend of three years, had a positive and caring relationship with Erika and appeared to have been a constructive factor in Erika's life. Kachorek reported that Erika, when told by Kara of the planned move to Florida, was sad and frightened about the loss of contact with James, and had asked James to relocate to Florida to permit them to remain in contact. Although Kachorek believed Kara's request to move to Florida was not motivated by a desire to

separate Erika from James, Kachorek noted that Kara's mother (who dislikes James and may have influenced the marital break-up) may have influenced or encouraged Kara's decision to seek a cross-country relocation. Kachorek was concerned that Erika's relationship with James, which would be negatively impacted as a result of the distance associated with a cross-country move, would further deteriorate as a result of the influence that Kara's mother would exert over Erika in Florida.

Kachorek, after acknowledging that each alternative had potential pitfalls, concluded it was in Erika's best interests to remain in California. A move to Florida would diminish Erika's relationship with James, deprive her of the benefits of her relationship with Ms. H., and could cause Erika to become more depressed. Kachorek recommended that Erika remain in California and, if Kara decided to stay in Southern California, Erika should continue residing with Kara and the visitation schedule developed during an August 2002 mediation be implemented.

The court concluded that although the custody issue arose in a postjudgment setting, it would apply the *best interests of the child* standard to determine whether to alter the existing custody and visitation orders if Kara moved to Florida. The court found it was in Erika's best interests to remain in California, Erika would continue to reside with Kara (and the visitation schedule developed during an August 2002 mediation be implemented) as long as Kara remained in California, and a transitional arrangement would be implemented if Kara left California. The trial court relied on numerous findings for determining it was in Erika's best interests to remain in California, including James's capacity for providing a good home for Erika, the likely deterioration of Erika's

relationship with James (as well as Ms. H.) if Erika moved across the country, and the likelihood that James rather than Kara would encourage and support an ongoing relationship with the distant parent.

Kara timely appealed.

II

ANALYSIS

Kara argues the trial court erroneously applied the *best interests of the child* standard to deny her request for a move away order. She contends it committed a predicate error by concluding the stipulated custody arrangement incorporated in the 1997 marital dissolution judgment was not a final judicial custody determination within the meaning of *Montenegro v. Diaz* (2001) 26 Cal.4th 249 (*Montenegro*). Kara asserts the 1997 judgment *was* a final judicial determination of custody within the meaning of *Montenegro*, and she therefore had a presumptive right under *In re Marriage of Burgess* (1996) 13 Cal.4th 25 (*Burgess*) to relocate with Erika to Florida. Kara argues that under *Burgess,* the issue is not whether Erika's best interests were served by denying her move away request but rather whether there had been a significant change of circumstances since the final determination of custody, and Erika would suffer such detriment by relocating to Florida that it was essential or expedient for her welfare to deny the move away request. Kara does not contend the denial of the move away request was an abuse of its discretion under the *best interests of the child* standard applied by the trial court, but instead argues there was an insufficient showing of changed circumstances and the more

stringent standard of detriment was not satisfied; therefore the court's order must be reversed.

We conclude the trial court applied the correct standard when it evaluated Kara's request for a move away order. Under *Burgess*, when the parties have stipulated to a temporary custody arrangement and there has been no *permanent* judicial custody determination entered, the trial court evaluates a request for a move away order as an initial custody determination and applies the *best interests of the child* standard to determine whether the moving or the remaining parent should have custody, and may consider all relevant factors, including the effects of relocation on the rights and welfare of the children. (*Burgess, supra*, 13 Cal.4th at pp. 31-32.) However, *Montenegro* recognized that when there has been a permanent judicial custody determination entered, a party seeking to modify the custodial arrangement must show the additional element of a significant change of circumstances warranting a change in the prior custody determination. (*Montenegro*, *supra*, 26 Cal.4th at p. 256; see also *Burgess, supra*, 13 Cal.4th at p. 37; *Burchard v. Garay* (1986) 42 Cal.3d 531, 535.) Under *Montenegro,* a stipulated custody order should be treated as a final judicial custody determination only if there is a "clear, affirmative indication the parties intended such a result" when they entered the stipulation. (*Montenegro*, *supra*, at p. 258.)

Kara asserts the 1997 judgment incorporating their stipulated custodial arrangement *was* a final judicial determination within the meaning of *Montenegro*, there was no significant change in circumstances and it was error to apply the best interests rather than the detriment standard in reaching the decision. James counters that the

absence of a clear, affirmative indication the parties intended their stipulation as a final judicial determination demonstrates the trial court correctly ruled it was not a final judicial determination within the meaning of *Montenegro*, and therefore properly applied the best interests standard in reaching its decision. We are convinced that, even if Kara correctly construes the 1997 judgment as a final judicial determination, the recent decision in *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072 (*LaMusga*) demonstrates there was sufficient evidence of changed circumstances and the trial court applied the correct standard when it evaluated Kara's request for a move away order.

In *LaMusga*, the court clarified the nature of the requisite showing and the standards to be applied when, after a permanent custody order has been entered, the custodial parent seeks a move away order and the noncustodial parent opposes relocation of the children and seeks custody. The trial court in *LaMusga*, after concluding the mother's request to relocate herself and her children from California to Ohio was not in bad faith, assessed whether the children's best interests would be served by relocating to Ohio and, finding such relocation was not in their best interests, ordered that custody be transferred to the father if the mother elected to move to Ohio. (*LaMusga, supra,* 32 Cal.4th at pp. 1085-1086.) The *LaMusga* court surveyed and approved numerous cases (including *In re Marriage of Edlund & Hales* (1998) 66 Cal.App.4th 1454 (*Edlund*)) holding that trial courts have wide discretion when considering whether or not to approve a request to relocate, noting that the core consideration in such cases is to assess the impact of the relocation on the child's welfare. (*LaMusga,* at pp. 1089-1096.)

Although approving the decision in *Edlund*, *LaMusga* went on to note:

> "[T]he Court of Appeal in *Edlund* may have inadvertently generated some confusion when it stated as a general conclusion: 'The showing of "changed circumstances" required of the noncustodial parent must consist of more than the fact of the proposed move.' [*Edlund, supra*, 66 Cal.App.4th at p. 1469.] If we interpret this statement narrowly, it certainly is true. The mere fact that the custodial parent proposes to change the residence of the child does not automatically constitute 'changed circumstances' that require a reevaluation of an existing custody order. A proposed change in the residence of a child can run the gamut from a move across the street to a relocation to another continent. As we have noted, the noncustodial parent has the burden of showing that the planned move will cause detriment to the child in order for the court to reevaluate an existing custody order. [¶] But some courts have mistakenly interpreted the above quoted statement in *Edlund* more broadly to mean that the likely consequences of a proposed move can never constitute changed circumstances that justify a reevaluation of an existing custody order. [Citations.] This is incorrect. The likely consequences of a proposed change in the residence of a child, when considered in the light of all the relevant factors, may constitute a change of circumstances that warrants a change in custody, and the detriment to the child's relationship with the noncustodial parent that will be caused by the proposed move, when considered in light of all the relevant factors, may warrant denying a request to change the child's residence or changing custody. The extent to which a proposed move will detrimentally impact a child varies greatly depending upon the circumstances. We will generally leave it to the superior court to assess that impact in light of the other relevant factors in determining what is in the best interests of the child." (*LaMusga*, *supra*, 32 Cal.4th at pp. 1096-1097.)

The above analysis from *LaMusga* clarifies that, while not *every* proposed change of residence will satisfy the changed circumstances element necessary to support a noncustodial parent's request to reevaluate a permanent judicial custody determination, a significant relocation can satisfy the changed circumstances element when there is evidence the proposed move will detrimentally affect the child's relationship with the noncustodial parent. Kara cites *In re Marriage of Lasich* (2002) 99 Cal.App.4th 702,

717-718 to argue that the mere fact of a proposed relocation, or its attendant consequences, cannot alone satisfy the changed circumstances or detriment elements. However, *Lasich* relied on *Edlund* for this proposition, and *Lasich* was one of the cases cited by *LaMusga* as having "mistakenly interpreted . . . *Edlund* . . . to mean that the likely consequences of a proposed move can never constitute changed circumstances . . . ." (*LaMusga, supra*, 32 Cal.4th at p. 1097.) Accordingly, *LaMusga* disapproved this aspect of *Lasich*. We conclude the changed circumstances element was present in this case.

Kara argues that, even if the changed circumstances element was met here, the trial court erroneously reassessed the custody arrangement by employing the best interests of the child standard rather than employing the higher standard of proof that Erika would suffer such detriment that it was "essential or expedient" for her welfare to alter the custodial arrangement. (*In re Marriage of Campos* (2003) 108 Cal.App.4th 839, 843.) However, *LaMusga* clarified that the *essential or expedient* standard is simply a rearticulation of the same best interests of the child standard applicable to all custody determinations, explaining:

> "The Court of Appeal in the present case held that the father bore the burden of showing 'that modification of custody is essential for the child's welfare,' citing our statement in *Burgess* that a change of custody in a move-away case is justified 'only if, as a result of relocation with that parent, the child will suffer detriment rendering it " 'essential or expedient for the welfare of the child that there be a change.' " [Citation.]' (*Burgess, supra*, 13 Cal.4th 25, 38.) It is significant that the Court of Appeal reduced the phrase 'essential or expedient' that we used in *Burgess* to simply 'essential.' In doing so, the Court of Appeal placed too great a burden on the noncustodial parent in a move-away case. [¶] The phrase 'essential or expedient'

> in *Burgess* derives from the opinion in *Washburn v. Washburn* (1942) 49 Cal.App.2d 581, 587 [122 P.2d 96], which held that a change of custody could be ordered only 'where adequate cause [therefor] arises out of changed conditions.' The *Washburn* court stated: 'Generally speaking, there may be no change in the custody provisions of a decree unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change.' (*Id*. at p. 588.) The court further noted that '[i]n custody cases the underlying principle, paramount to all others, is the welfare and best interests of the child' (*id*. at p. 587) and 'each case must be solved on its own facts.' (*Id*. at p. 588.) Neither *Washburn* nor *Burgess* imposes upon the noncustodial parent an artificial requirement to prove that a change in custody is 'essential.' Both cases recognize that the paramount concern is the welfare and best interests of the child. *A change in custody is 'essential or expedient' within the meaning of Burgess, therefore, if it is in the best interests of the child*." (*LaMusga, supra*, 32 Cal.4th at pp 1097-1098, italics added.)

Thus, *LaMusga* dispelled what may have been a reasonable misconception by courts and family law practitioners--that a parent resisting the move need establish that a change of custody is essential to prevent detriment to the children--and clarified that the resisting parent has the less onerous burden of showing that the proposed relocation required a reevaluation of the existing custody arrangement because a change in custody would be in the child's best interests.

Accordingly, whether the 1997 judgment was a temporary custody determination that required evaluation of the move away request under the best interests standard, as in *Burgess* and *Montenegro*, or was a permanent order that required reevaluation of the custody arrangement under the best interests standard because of the changed

circumstances presented by Kara's proposed cross-country move,[2] as in *LaMusga*, the standard employed by the trial court here to assess the issues before it was the correct standard.

Although Kara does not explicitly assert the order was an abuse of discretion under the best interests standard, we nevertheless examine whether the trial court, having applied the appropriate standard,[3] abused its discretion by concluding Erika's best interests were served by denying Kara's request to relocate Erika to Florida. "The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.] The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest[s]' of the child." (*Burgess, supra,* 13 Cal.4th at p. 32.) The trial court found James was capable of providing a good home for Erika; Erika was bonded to James and Ms. H. (who exerted a positive influence on Erika) and Erika's relationship with them would be negatively

---

2 We note that, even assuming the changed circumstances calculus could ordinarily disregard the spatial and temporal separation associated with a long distance move, Kara's proposed move to Florida significantly changed the factual circumstances on which the parties' 1997 stipulated custody arrangement was based. The parties' 1997 stipulation to the existing custody arrangement was founded on an agreed premise--that "it is in the best interests of [Erika] to continue to have frequent and continuing contact with both of [her] parents"--that would evaporate if Kara relocated to Florida. This fundamental change in the assumptions on which the parties relied to reach their agreement as to the custodial arrangement that served Erika's best interests warranted revisiting whether placement with Kara in Florida served Erika's best interests.

3 We must uphold the ruling of the trial court "if it is correct on any basis, regardless of whether such basis was actually invoked." (*Burgess, supra,* 13 Cal.4th at p. 32.) Because the trial court applied the correct standard, its underlying reasons for adopting that standard are irrelevant.

impacted by the move; James was more likely to encourage and enable Erika to maintain a relationship with Kara; Erika was emotionally distressed by the prospect of being separated from James; and Kara's mother (who exerts significant influence over Kara and would assume an increased role in Erika's life if she relocated to Florida) dislikes James and devalues his involvement with Erika. Because substantial evidence supports these findings, and these findings could permit a trial court reasonably to conclude that remaining in California advanced Erika's best interests, the order was not an abuse of discretion.

DISPOSITION

The order is affirmed. James is entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.